United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL 74-1900

To Be Argued By
RICHARD T. HAEFELI, ESQ.

B P/S

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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THOMAS DWEN, as President of the Suffolk County Patrolmen's Benevolent Association and THOMAS DWEN, individually,

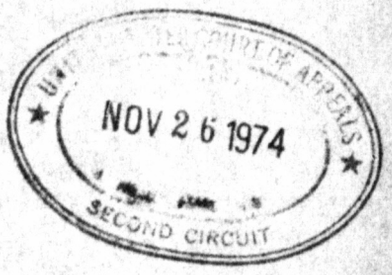
Plaintiff-Appellee,

-against-

JOHN L. BARRY, Commissioner of the Suffolk County Police Department.

Defendant-Appellant

----------x



ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PLAINTIFF - APPELLEE'S BRIEF

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INTRODUCTION

This case was originally instituted by both an order to show cause dated August 7, 1971, requesting a preliminary injunction, and a summons and complaint requesting a permanent injunction against enforcement of a grooming regulation issued by the defendant, Suffolk County Police Commissioner.

Based upon the papers submitted, the Hon. Jacob B. Mishler denied the plaintiff's request for a preliminary injunction in a decision and order dated November 8, 1971, and dismissed the

plaintiff's action in a decision and order dated November 30, 1971.

Both orders were appealed by the plaintiff, and this Court in a decision dated August 22, 1973, reversed and remanded the action for a trial on the merits. [483 F.2d 1126].

The trial was held before Judge Mishler on the 3rd day of April, 1974, at which time the complaint was amended to include the grooming regulation as amended (5,6,78)* The only witness to testify at the hearing was Deputy Commissioner Robert C. Rapp (17,18) who testified in support of the regulation.

The court rendered its decision in writing on the 30th day of May, 1974, declaring the regulation "unconstitutional, void and of no effect and permanently enjoining the defendant from enforcing [the regulation]". (8)

The defendant filed a Notice of Appeal on the 18th day of June, 1974. (1)

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*Refers to appendix on appeal

POINT I

THE TRIAL COURT PROPERLY CONCLUDED THAT THE DEFENDANT DID NOT INTRODUCE ANY PROOF TO SUSTAIN HIS BURDEN OF ESTABLISHING A GENUINE PUBLIC NEED FOR THE REGULATION

The only question on appeal is whether this Court "...on the entire evidence is left with the definite and firm conviction that a mistake has been committed," United States v. United States Gypsum Co., 333 U.S. 364,395,68S.Ct. 525,542. Absent such a conviction this Court must accept the findings of the trial court and cannot set them aside as clearly erroneous. Fed. R. Civ. P.52 (a); Lassiter v. Fleming, 473 F 2d. 347 (2nd Cir., 1973).

The trial court found that no proof had been offered by the defendant to support his claim (7) that the regulation was issued to insure safety (23,24) and promoted a neat appearance (27,28). On the issue of safety, the trial court concluded that the regulation bore no relationship to safety, rather it was related to hair styling (6) and

on the issue of appearance, the regulation rather than providing grooming standards did nothing more than demand uniformity (7).

The testimony upon which the court came to its conclusion was supplied by the only witness, Deputy Commissioner Rapp, who testified that long hair created a safety hazard in that an individual could grab the hair, thereby rendering the officer defenseless (24-27). Deputy Commissioner Rapp demonstrated this procedure with the aid of the court reporter (25), yet in doing so Deputy Commissioner Rapp grabbed that portion of the court reporter's hair which was above the collar and not in violation of the regulation (26). Deputy Commissioner Rapp also testified that the same reasoning would apply to beards (27).

On cross examination Deputy Commissioner Rapp testified that instead of pulling on the beard, a person could pull a police officer down just as readily by pulling his tie (55), or any portion of his clothes which could be grabbed (56).

He also described for the record the grooming of two police officers present in court and stated that although the hair style adopted by each officer violated the regulation (41,42), the violation in each case did not constitute a safety hazard (42) and in fact the hair styles of both officers were within the standard acceptable to the public (44).

Based upon this testimony it is obvious, that not only were the findings of the trial court correct, but that the defendant totally failed to meet "the burden of establishing a genuine public need for the regulation" (87) [483F.2d at 1131], whether such burden was to establish a rational basis or compelling state interest, the latter being more appropriate to this type of case. (14), See, Breen v. Kahl, 419 F.2d 1034,1036 (7th Cir.,1969).

Finally, since the court in it's prior decision considered and rejected the cases cited by the appellant in his brief as well as the paramilitary rationale upon which they are based, there in no need to further discuss them at this time.

CONCLUSION

THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED

Dated: November 21, 1974

Respectfully submitted,

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of Counsel

STATE OF NEW YORK
COUNTY OF NEW YORK

BERT MYERS being duly sworn deposes and says: On November 26th, 1974 I served the within ~~record on appeal~~ brief ~~appendix~~ on Assistant County Attorney, appellant ~~respondent~~ by ~~leaving~~ mailing ~~three~~ two copies thereof to Patrick A. Sweeney the attorney for the ~~at his~~ office located at 691 Fort Salonga Road Northport, New York 11768

Bert Myers

Sworn to before me
this 26th day of
November 1974

Theresa Corless

THERESA CORLESS
Notary Public, State of New York
No. 4518917
Qualified in Bronx County
Term Expires March 30, 1976